

Response to the Insolvency Service consultation on reform of the process to apply for bankruptcy and compulsory winding up

Introduction

The Consumer Credit Counselling Service (CCCS) is the UK's largest dedicated provider of independent debt advice. Last year we helped just under 400,000 people via our telephone helplines and online service. CCCS is run independently of taxpayer money on the basis of a unique set of relationships with the all the major banks, credit card companies and other creditors. Our funding model means we can provide impartial advice and specialist insolvency support as people need.

To this end, we maintain a specialist team of bankruptcy counsellors to provide advice to those clients who are recommended to bankruptcy as the best way of dealing with their debts. In 2011, this service dealt with 11,000 calls; nine percent of the clients counselled were advised that bankruptcy was their best option, compared with five percent recommended an Individual Voluntary Arrangement (IVA) and six percent a Debt Relief Order (DRO).

Recommendations following counselling

	2009	2010	2011
Token Payments	4.6%	4.3%	5.0%
Realise Assets	1.6%	2.0%	2.2%
Other	4.2%	3.3%	3.8%
Meets Actual Payments	8.9%	8.9%	10.1%
IVA/Trust Deed	6.8%	6.4%	5.1%
Income Maximisation	31.7%	32.0%	28.7%
Equity Release	0.4%	0.4%	0.5%
Debt Management Plan	25.8%	28.0%	29.3%
Debt Relief Order	4.1%	4.9%	6.0%
Bankruptcy/Sequestration	11.9%	9.6%	9.3%

Clearly, bankruptcy is an important means of helping people resolve their situation when, for whatever reason, their debts have grown out of all proportion to their ability to repay them. Bankruptcy, however, is still a serious step for anyone and should not be taken lightly, without full knowledge of its implications. At the same time it is the CCCS ethos to encourage the repayment of debts: we believe that those who can afford to repay their debts should be helped to do so.

We welcome the overall thrust of this consultation to simplify the process for undisputed bankruptcies by removing the need to go to court, but we do have some concerns about the implications of what is being proposed on our clients as well as on the over-indebted population as a whole. Therefore, before we answer the specific questions contained in the consultation, we have outlined these concerns over the page.

Issues and Concerns

1. Importance of debt advice

In order to ensure that bankruptcy is the appropriate course of action for the debtor, we believe it is vitally important that the debtor has received independent, disinterested advice which has established that no other solutions are more suitable for the debtor's circumstances. We fully recognise that bankruptcy is the best solution in certain circumstances but it has to be understood that it has serious implications for the debtor and his family. The Adjudicator needs to establish that such advice has been sought from an appropriate source, namely one of the free, charitable debt advisers such as CCCS, National Debtline or Citizens Advice.

At the moment, judges making the bankruptcy order will confirm with debtors that they have sought advice and we do not believe that this should be an administrative burden for the Adjudicator. For example, all CCCS clients receive a recommendation for the best solution in their circumstances, either online or through the post. A copy of this could easily be attached to the application.

It is recommended that the Insolvency Service should consider accrediting suitable debt advisers much as they do at the moment for those authorised to provide Debt Relief Orders (DROs). This would mean the Adjudicator would be confident that the advice given was sound and always in the best interests of the client. We are not proposing the full service involved in the DRO process which includes checking and verifying the information provided by the client as this would not be practical but would include a full advice session based on the information provided by the client.

We believe it would not be appropriate for the Post Office to be used as a "checking service" along similar lines to that offered for passport applications. Post Office personnel do not have the required expertise.

2. Costs for the debtor

The consultation maintains that one of the reasons for removing the court process and substituting an Adjudicator is to reduce costs for both the consumer and the public purse. We are not equipped to comment on the latter but we believe that the reduction in the court costs will, at best, make little difference to the debtor and, in some cases, will actually make the debtor slightly worse off. The major costs for the debtor are not the court fees but rather the payment for the Official Receiver. This is currently £525 and we understand that there are no plans to reduce this.

There is no doubt that raising such a substantial amount of money is probably the single biggest issue preventing our clients from proceeding to bankruptcy. It is one which remains difficult for us to resolve. With explanations and practical advice, our counsellors are usually able to re-assure clients about the court process which many find initially intimidating but fees are another matter.

Our bankruptcy team has put a lot of effort into finding trust funds where we can refer clients for help and in the 18 months until the end of 2011, we sourced £67,000 for clients. Trust funds, however, are only available for clients on benefits and with no assets, with only one in five applications successful. For the bankruptcy referrals who are working, raising these fees is a serious hurdle, particularly for a couple who need to raise twice the amount.

We understand that the court fees for debtors in most instances will be set at £69 compared with the current court fees of £150 but that there will no longer be exemptions for those on benefits. This means that many clients will have to raise an additional £69 on top of the deposit of £525. In 2010, clients recommended to bankruptcy were left on average with a surplus of only £60 after their living costs had been taken into account. This means it would take clients over 10 months to raise the total fees currently proposed.

We urge the Insolvency Service to look at the whole issue of fees and, at the very least, to consider exempting the least well-off from the Adjudicator's fee.

3. Availability of Debt Relief Orders (DROs)

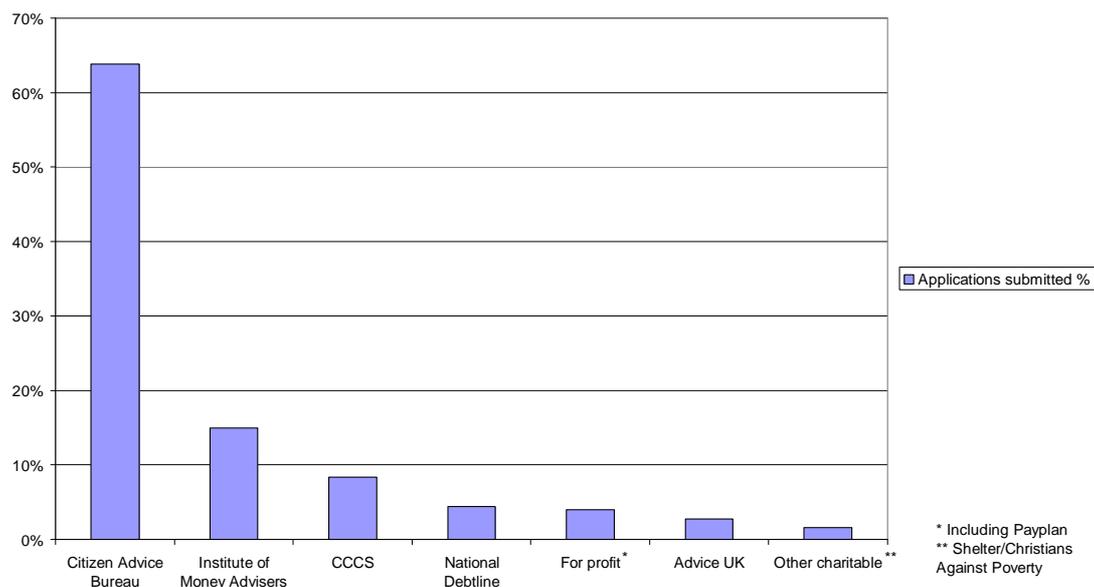
One of the reasons given in the consultation for not having any exemptions from the Adjudicator's fee is the widespread availability of DROs for the least well-off. It is certainly true that DROs have proved to be an effective form of debt relief for a significant number of people (see our recommendations chart on p1), nevertheless, there are a number of reasons why DROs are likely to remain a less effective form of insolvency than bankruptcy, even for the least well-off.

Firstly, the criteria for eligibility are not based on income alone which means that a DRO would not be suitable for many of the less well-off whose debts total more than £15,000. It should be noted that the average debt for CCCS clients in 2011 was just over £20,000.

Secondly, we are concerned about the continuing availability of DROs. They are time-consuming to administer and the amount paid to intermediaries is far from covering these costs, which CCCS estimates at £300 per person. As a result, Citizens Advice Bureaux (CAB) currently provide the vast majority of DROs which makes it likely that the removal of legal aid will have a dramatic impact on the accessibility of DROs, particularly for the most vulnerable who need face-to-face help.

At the moment, CAB has 1,000 trained intermediaries who are all debt advisers funded through legal aid. CCCS has 11, soon to be raised to 18 following training. The chart below suggests if all the CAB legal aid intermediaries are taken out of the system, it would be much harder for debtors to be able to access DROs.

Debt Relief Orders: Applications Q2 and Q3 2011



Source: Insolvency Service

4. Applications process

Finally, the consultation, with some justification, points to the success of DROs as a useful precedent in providing a non-court based form of insolvency and where applications can be made available online (although we welcome the fact the applications for bankruptcy can be made by post as well as online).

On the basis of our experience with DROs, we would make a plea for the process to be kept as straightforward as possible. There is much to be learnt from the experience of DROs and the Insolvency Service is working with CCCS as well as other advisers to enhance and streamline the process.

Response to relevant questions

Question 1: Should documents relating to a bankruptcy or winding up case remain with the party who created them, and be open to inspection there by persons so entitled? If not, please explain your answer.

Yes

Question 2: Do you think that a debtor should be able to pay instalments within a specified period of time after submission of his/her application, or that there should be no such time constraints but only when full payment has been made would a debtor be able to complete and submit an application form?

We would refer you to our concerns about fees on page 2 under the section entitled *Costs to the debtor*.

We believe it is better for the application to be considered once full payment has been made but some means should be provided for debtors to save up in instalments, similar to the way they can for DROs.

Question 3: If you favour a limit on the period of time during which instalments could be paid, what do you think should be the maximum period? Less than 3 months? 3 months? Or more than 3 months?

It would seem reasonable to make this six months as this is the time allowed for DRO instalments, particularly as the sums involved for bankruptcy are so much greater.

Question 4: Should instalment payments be non refundable?

DRO clients who pay the fee, but decide not to go ahead, provided the final 'submit' button has not been hit, can get a full refund of any monies paid. Some of our clients have requested and obtained their money back in cases where they have had a change of circumstances after making some payments, or information has come to light which means that a DRO would not be suitable.

CCCS believes that the same process should be followed for bankruptcy. There would need to be a key point in the process when the bankruptcy request is made to the Adjudicator 'formally': once this point has been passed, the fee should be non-refundable. Given that the fees needed for bankruptcy are much higher than for DROs, it is likely that the client will need more time to save the correct amount, therefore the client's circumstances are more likely to change.

Question 5: If not, how should the administrative costs of handling the refund be recouped?

It seems unlikely that refunding payments will impose much of an administrative burden on the Insolvency Service. Its payment department already deals with any payments into the Service, including the occasional refunds for DROs. We do not believe that bankruptcy refunds would be a particularly frequent occurrence and therefore there should be no need to recoup costs for handling refunds.

Question 6: Should there be any additional requirements for registration in order to deter abuse? If yes, please outline what you think those requirements should be.

It is very important that clients are able to demonstrate that they have received expert and unbiased debt advice. As outlined in our earlier remarks it is recommended that the Insolvency Service should consider accrediting suitable debt advisers much as they do at the moment for those authorised to provide Debt Relief Orders (DROs). The aim is to be sure that debtors have received the advice they need before deciding on bankruptcy. The advice received should be based on information provided by the debtor; it should not be a requirement of the adviser to check and verify this information as the official receiver verifies the facts where appropriate as part of the investigation.

Question 7: Do you think it would be useful for the Post Office Ltd (or another business that provides a similar service) to offer a “check and send” service?

It is inappropriate for the Post Office to offer this service as the staff lack the expertise to ensure the debtor is receiving the correct advice.

Question 8: Do you think that there should be a fully electronic process for third parties who submit applications for individuals’ bankruptcy or for companies to be wound up? If you think not, can you explain why not?

This seems reasonable as third party applicants will almost always be businesses with access to computers.

Question 9: Do you think that there should be differential pricing according to whether an application is submitted by a third party in paper form or electronically? Please explain your answer.

Believe this question is irrelevant in view of above

Question 10: Do you think that third parties should only be able to pay application fees electronically? If not, can you say why not and suggest alternative or additional means of payment?

Yes

Question 11: Do you think that there is scope for a pre-action process to encourage greater settlement of debt claims before a creditor resorts to bankruptcy or compulsory liquidation?

We support this on the basis that anything which helps the debtor to avoid bankruptcy must be good but we believe that there should be agreed timescales in place. We strongly recommend that a key part of the pre-action process should be a recommendation from the creditor to seek advice from a debt charity.

It is recommended that the pre-action process should work alongside the current system of notices as we believe that this would initiate dialogue

between the lender and the debtor and would encourage the debtor to seek debt advice.

Question 12: Is 21 days an adequate time period within which debtors can respond to a pre-action notice? If not, please suggest a more suitable period and explain your reasoning.

It is recommended that creditors agree that evidence of consulting a debt advice agency such as a client reference number should be sufficient to show that the client is taking action to address issues. We recommend that the time allowed to respond should be 30 days to bring it in line with other cooling off periods agreed by creditors once debtors have confirmed that they are seeking debt advice.

Question 13: Can you suggest any additional matters that you think ought to be included in the pre-action process? Is there anything listed that should not be included? Please give reasons for your answer.

No this seems a sensible list but the need to seek debt advice should be forcefully stated.

Question 14: Do you think that the pre-action process should be mandatory or discretionary?

Mandatory

Question 15: Do you think that there should be sanctions for a creditor who indicates it has complied with the pre-action process when it has not? Do you think those sanctions should be civil (such as costs or more onerous requirements for filing future applications) or criminal or do you think there should be the option of both?

It should impact on consideration of their fitness to hold a consumer credit licence.

Question 16: Do you think that these questions would be helpful to applicants in deciding whether they are entitled to make an application on the grounds of a debtor's COMI?

Question 17: Can you suggest any other matters that the guidance could usefully cover to further help applicants?

Question 18: How likely is it that a third party such as a creditor will know, or be able to find out with reasonable accuracy, a debtor's email address and/or mobile telephone number?

Very easy to obtain

Easy to obtain

Not easy

Difficult

Very difficult to obtain

Don't know

We have no comments to make on Qs 16, 17 and 18

Question 19: Is it reasonable to require a creditor to re-serve a statutory demand if more than 4 months have elapsed between service of the demand and making the application?

Yes

Question 20: Who do you think should be responsible for sending a copy of the bankruptcy application to the debtor and eliciting his/her response?

This is a matter which should be decided between the creditor and adjudicator.

Question 21: Do you think that a prompt by text message (which would only be sent if a debtor consents to the use of his/her mobile telephone number in this way) would be an effective mechanism to help alert the debtor to the imminent arrival of further information by post and/or email? Please explain your answer.

We believe this would be impractical, difficult to administer with limited benefits.

Question 22: Do you agree that the only dialogue between the debtor and the Adjudicator should be to confirm correct contact details, and to establish whether the criteria for making a bankruptcy order are met. e.g. whether the application process has been complied with by the creditor; whether there is a debt that exceeds the bankruptcy level; and whether the jurisdiction criteria are satisfied. If not, can you suggest what other dialogue might need to take place and why?

The adjudicator should confirm to the debtor that it important to have received appropriate advice and that the consequences of bankruptcy are understood.

Question 23: Is there any other way in which a dispute might be resolved before the court becomes involved? Or do you think that it is appropriate that a judicial decision is given at this stage in the proceedings?

Questions 24: Do you agree with the way we suggest that applications to which there is neither consent nor opposition should be handled? If not, can you explain why not and suggest an alternative solution?

We have nothing to say on Qs 23 and 24

Question 25: What period of time would it be appropriate to allow the debtor to communicate his/her response to the Adjudicator? 14 days? Less? Or more?

For the sake of consistency, this should be 30 days.

Question 26: Do you think a third party applicant should be able to request to withdraw its application at any time up to the point at which it is determined?

Yes

Application for compulsory winding up of a company

CCCS has not responded to any questions in this section as it is not relevant to our work.